No. 13-19-237-CR

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT CORPUS CHRISTI

DALLAS S. CURLEE,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

ON APPEAL FROM THE 24TH DISTRICT COURT
JACKSON COUNTY, TEXAS

BRIEF FOR THE STATE

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ORAL ARGUMENT IS REQUESTED

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THE STATE OF TEXAS, Appellee.	§	DISTRICT OF TEXAS

BRIEF FOR THE STATE

TO THE HONORABLE COURT OF APPEALS:

SUMMARY OF THE ARGUMENT

Issue One – Curlee's own confession, as well as testimony suggesting that he must have gathered the drugs together and hidden them inside a baseball cap on the floor, are sufficient to prove knowing possession.

Issue Two – Testimony showing that the offense occurred within 1,000 feet of a church playground that was open and accessible to the community was sufficient to prove the drug free zone enhancement.

Issue Three – The trial court properly denied Curlee a hearing on his motion for new trial when his allegation that the jury received "other evidence" was not substantiated by the record or any affidavit.

ARGUMENT

Reply Point No. 1
The evidence was legally sufficient to prove possession.

Curlee challenges the sufficiency of the evidence to show that he knowingly possessed the drugs found in the van in which he was present.

I. Statement of Relevant Facts.

Officer Gary Smejkal testified that he saw Curlee sitting in the bench seat in the back of the van in question. (RR vol. 4, pp. 52-53) Curlee told Officer Smejkal not to come in the van unless he brought a drug dog. (RR vol. 4, p. 59) Officer Smejkal inventoried the van and found State's Exhibits 1 – 11, which included the drugs in question along with a cell phone, lottery ticket, glass pipe, and syringe, in the same place inside a baseball cap. (RR vol. 4, pp. 60-67) Officer Smejkal also drew a diagram of the van indicating that the cap in question was found on the floor of the van about a foot away from Curlee. (RR vol. 4, pp. 72-73; SX # 29) Officer Smejkal later testified that Curlee was "A couple feet, at most" from the hat in question. (RR vol. 4, p. 167)

Curlee admitted during his recorded statement that the telephone found in the van was his (ca. 1:30), that the "scratch off" lottery ticket was his (ca. 8:30), and, although he initially denied that the drugs found in the baseball cap were his, he eventually implied that they were in response to

questioning about how he was using the drugs, specifically admitting with regard to the pipe and syringe found with the drugs in question that sometimes he both smokes and shoots it. (ca. 12:00 – 13:00) (RR vol. 4, p. 82; SX # 25)

Hillary Hammond testified that she had put the drugs in question and the syringe and other things on the back seat of the van, before she left to go into the jail. (RR vol. 4, pp. 173-74) Hammond also testified that Curlee at times did methamphetamine. (RR vol. 4, p. 190)

II. Standard of Review.

In order to determine if the evidence is legally sufficient, the appellate court reviews all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979). In *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), the Court of Criminal Appeals abandoned factual sufficiency review and determined that the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient. This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts." *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010) (quoting *Jackson*, 443 U.S. at 319).

III. Confessions and the Corpus Delicti Rule.

The corpus delicti rule requires that a defendant's extrajudicial confession be corroborated by some other evidence showing that a crime has been committed. *Nisbett v. State*, 552 S.W.3d 244, 263 (Tex. Crim. App. 2018). In a drug possession case, evidence that the substance in question is in fact an illegal drug is sufficient to corroborate the defendant's admission that he is the one who possessed that drug. *See Steele v. State*, 681 S.W.2d 129, 131 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd).

Accordingly, in the present case, Curlee's recorded statement contained a clearly implied confession that the drugs were his, and the lab report later entered into evidence confirming that they were methamphetamine sufficiently corroborated that confession by showing that a crime had been committed.

Nevertheless, in the present case there is clearly more than that to show that Curlee possessed the methamphetamine in question.

IV. Affirmative Links.

To establish its case for possession of a controlled substance, the State must prove that the defendant exercised care, control, or management over the methamphetamine and knew the substance was methamphetamine. *See* Tex. Health & Safety Code Ann. § 481.115(a), (c); *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), *abrogated on other grounds by Robinson v. State*, 466 S.W.3d 166, 173 n.32 (Tex. Crim. App. 2015). The evidence must show that the defendant's connection with the drug was more than just fortuitous, which is the "affirmative links" rule. *Poindexter*, 153 S.W.3d at 405–06. The factors courts consider when determining the establishment of affirmative links are:

> (1) the defendant's presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place where the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Evans v. State, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006). "It is ... not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial." *Evans*, 202 S.W.3d at 162.

In the present case, although not all of the listed affirmative links were present, Curlee was found within one to two feet from the drugs, and the only other person who had access to the drugs in question testified to facts that suggest Curlee must have gathered the drugs together and secreted them in the baseball cap on the floor.

As factfinder, the jury is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony of a particular witness. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Swartz v. State*, 61 S.W.3d 781, 788 (Tex. App.—Corpus Christi 2001, pet. ref'd). Hammond testified, in pertinent part, that she placed the drugs and other items on the back seat. However, when police searched the van with Curlee present, the drugs were found, along with Curlee's phone and lottery ticket, inside a baseball cap on the floor of the van. From Hammond's testimony, it would have been reasonable for the jury to infer that Curlee exercised car and control over the drugs to the extent that he gathered them into the baseball cap and put it on the floor, presumably in order to hide them from the police. Clearly, this conduct affirmatively linked Curlee to

the drugs sufficient to show possession, in addition to his implied admission to that effect.

Curlee's first issue on appeal should be overruled.

Reply Point No. 2
The evidence was legally sufficient to prove that the playground in question was open to the public.

Curlee complains that the State failed to prove the drug free zone enhancement by failing to present evidence that the playground was "open to the public."

I. Statement of Relevant Facts.

Officer Smejkal testified that the van was located less than 600 feet from the First United Mathodist Church in Edna (RR vol. 4, p. 84), which included an outdoor playground open to the public and around which there was a four-foot fence without locks on the gates. (RR vol. 4, pp. 86-89) Officer Smejkal testified to his belief that the gates were kept unlocked at all times. (RR vol. 4, p. 102)

Upon being recalled later at trial, Officer Smejkal testified concerning a number of photographs of the gates to the playground in question, including one gate that clearly could not have been locked because there was no "place where you could utilize any type of locking system." (RR vol. 4, pp. 157-159 ; SX # 34-36)

State's Exhibit # 17 indicates a computer generated distance of 547 feet from the parked van to the First United Methodist Church Playground.

State's Exhibits # 18 – 23 show a typical children's playground, with slides, ladders, a tunnel, and climbing bars, as well as various toys left on the ground. It further appears to have open and unblocked access to surrounding properties.

II. Drug Free Zone Enhancement.

Ordinarily, punishment for the present third-degree felony, enhanced to by a prior conviction, would be subject to the second-degree range of 2-20 years. *See* Tex. Health & Safety Code § 481.115 (a) & (c); Tex. Penal Code § 12.42 (a). However, the drug free zone enhancement applies to raise the minimum period of confinement by five years if the offense was committed within 1,000 feet of a playground that, among other requirements, must have been "open to the public." Tex. Health & Safety Code § 481.134 (a)(3)(B).

III. Open to the Public.

Few cases have fleshed out the criteria for being "open to the public" for purposes of the drug free zone enhancement.[1]

[1] With regard to Penal Code offenses, the Penal Code defines "public place" as "any place to which the public or a substantial group of the public has access." Tex. Penal Code § 1.07 (a)(40); *see Banda v. State*, 890 S.W.2d 42, 52 (Tex. Crim. App. 1994); *see also Beeman v. Livingston*, 468 S.W.3d 534,

In *Ingram v. State*, the Texarkana Court of Appeals concluded that, where there was no direct evidence that a privately-owned park was open to the public, the jury could not reasonably infer that it was "open to the public" for purposes of the drug free zone enhancement. 213 S.W.3d 515, 518–19 (Tex. App.—Texarkana 2007, no pet.).

On the other hand, in *Graves v. State*, the Houston Fourteenth Court of Appeals concluded that the jury could reasonably infer that an area that witnesses described as a "park," and which was open and accessible from a public street, was "open to the public." 557 S.W.3d 863, 867 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

It appears at least from *Graves* that the general nature of the place in question (there, a "park"; here, a church playground), coupled with its being open and accessible to the public, may lead to a reasonable inference that it is "open to the public" for purposes of the enhancement.

The jury may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence. *See Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

539–40 (Tex. 2015) ("public," when used as an adjective, means "open and accessible to the public").

Concerning the public nature of a church, the Court of Criminal Appeals has said, "We see no valid distinction, insofar as the law of burglary is concerned, between a church, into which the public has consent to enter for the purpose of meditation and prayer, and a place of business, into which the public has consent during business hours to enter for the purpose of transacting business." *Trevino v. State*, 254 S.W.2d 788, 789 (Tex. Crim. App. 1952) (on rehearing).

Since the earliest times, churches have been a source of charity and good will to the community, and an open playground at a church is surely one means by which that church extends its good will to the community it serves. And, just as the open and accessible sanctuary carries with it an implicit invitation for the public to enter for the purpose of meditation and prayer, an open and accessible playground adjacent to the church with no apparent or posted restrictions carries with it an invitation for children to play there.

In the present case, it is clear from the exhibits that even short little hands can open the gate in question to enter and play. And when such a playground is not locked or otherwise obviously restricted, it is "open" as far as children in the neighborhood as concerned, whether or not they have a formal invitation to play there.

Accordingly, the State presented legally sufficient evidence to prove that the playground in question was open to the public.

Alternatively, even if this Court should determine that the State presented insufficient evidence to support the drug free zone enhancement at the first trial, this should not prevent it from attempting to prove up that same enhancement at a second trial on punishment. When a reviewing court determines that the State's evidence fails to show that an enhancement allegation is true, the Double Jeopardy Clause does not bar the use of the enhancement conviction during a retrial on punishment. *Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008) (citing *Monge v. California*, 524 U.S. 721, 734, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998)).

Curlee's second issue on appeal should be overruled.

Reply Point No. 3
The trial court properly denied Curlee's motion for new trial without a hearing.

Curlee complains that, by denying him a hearing, the trial court improperly denied him an opportunity to show that the jury received outside evidence during its deliberations.

I. Statement of Relevant Facts.

When questioned about how he knew that the gates to the playground were unlocked, Officer Smejkal responded, "That is through conversations

with the pastor of that church," which drew a hearsay objection that the trial court sustained, but the witness was then passed without any instruction to the jury or further mention of the conversation with the pastor. (RR vol. 4, p. 102)

During its deliberations on guilt-innocence, the jury sent two notes.

The first asked "What happens if we cannot come to an agreement on the special issue? Must it be unanimous? If not, how do we resolve?" The trial court answered the question, without objection from either side, with the response "Yes, the answer to the special issue must be unanimous. Refer to my charge and continue your deliberations." (RR vol. 5, pp. 46-47; CR p. 104)

The second asked "Please provide Investigator Smejkal's testimony regarding church/playground and locks. Testimony was 4/23/19, particularly on whether public property or not, Carley Smith. Also talked with pastor." The trial court answered the question, without objection from either side, with the response "I will provide this to you. It will take some time, so please be patient." (RR vol. 5, pp. 47-50; CR p. 105) In addition, at the suggestion of the defense attorney, the trial court also instructed the jury "I remind you of my instructions not to talk to anyone about this case." (RR vol. 5, p. 50; CR p. 105) Later, after reviewing the testimony, the trial court

had relevant portions of the record read back to the jury by the court reporter. Defense made no objection at this time to any supposed impropriety regarding the reference to talking to the pastor, which the trial court interpreted as referring to Officer Smejkal's testimony concerning his talking with the pastor. (RR vol. 5, pp. 51-53)

In his motion for new trial, Curlee complained, among other things, that he was entitled to a new trial based on certain jury notes that supposedly showed both that the jury was not unanimous in answering the special issue concerning the playground enhancement, and that the jury had been subject to an outside influence from a "pastor," presumably the one at the First United Methodist Church where the playground in question was located. Curlee failed to include affidavits from the jurors or anyone else in support of his motion. (CR pp. 130 & 152) The trial court denied the motion for new trial without a hearing thereon. (CR p. 180)

II. Right to a Hearing.

The Court of Criminal Appeals has discussed the defendant's right to a hearing on his motion for new trial as follows:

> Such a hearing is not an absolute right. But a trial judge abuses his discretion in failing to hold a hearing if the motion and accompanying affidavits (1) raise matters which are not determinable from the record and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. This second requirement limits and prevents "fishing expeditions." A new-trial motion must be supported

> by an affidavit specifically setting out the factual basis for the claim. If the affidavit is conclusory, is unsupported by facts, or fails to provide requisite notice of the basis for the relief claimed, no hearing is required.
>
> Although we have often said that a defendant need not plead a prima facie case in his motion for new trial, he must at least allege sufficient facts that show reasonable grounds to demonstrate that he could prevail.

Hobbs v. State, 298 S.W.3d 193, 199–200 (Tex. Crim. App. 2009). The trial court's denial of a hearing is reviewed for an abuse of discretion. *Smith v. State*, 286 S.W.3d 333, 338–40 (Tex. Crim. App. 2009).

III. Other Evidence.

A defendant is entitled to a new trial if, among other things, "after retiring to deliberate, the jury has received other evidence [or] when a juror has talked with anyone about the case." Tex. R. App. P. 21.3 (f).

In the present case, Curlee seeks to interpret "talked with pastor" as an indication that the jury somehow communicated with the pastor of the church in question, in violation of their duty not to communicate with anyone about the case during deliberations. This interpretation would be speculative at best had these been the only words on the note. However, in the context of the entire note, this interpretation cannot stand even as a reasonably possible one. The focus of the note was clearly "Investigator Smejkal's testimony regarding church/playground and locks," and reference to talking with the pastor clearly pointed to Smejkal's own testimony to

conversations with the pastor. It would be absurd to interpret the note any other way, especially in the absence of any affidavits from the jury to suggest otherwise. To mandate a hearing in order to explore this interpretation would be tantamount to allowing the sort of fishing expedition that the "reasonable grounds" requirement was meant to eliminate.[2]

IV. Unanimous Verdict.

Finally, although the State believes that the argument under Curlee's third issue is clearly limited to the second note and a complaint about outside evidence, Curlee also makes some reference to the first note concerning the unanimity requirement. Accordingly, in an abundance of caution, the State

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[2] In the present case, moreover, the jury had been warned both in preliminary instructions and in the charge itself not to communicate with anyone else about the case during deliberations.

Specifically, the trial court gave the jury written Preliminary Instructions prior to giving them the jury charge on guilt-innocence, which told them, among other things, of their "duty to follow all such instructions," "to follow carefully all instructions which I have given you, as well as others which you later receive while this case is on trial," not to discuss the case with anyone or allow anyone to discuss it within their hearing, and to report to the trial court anyone who attempts to discuss the case with the jury. (CR p. 100)

The jury charge on guilt-innocence specifically instructed the jury that "No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss nor relate any matters not in evidence before you," and warned them not to attempt to talk to anyone concerning the questions they may have. (CR pp. 108, 111)

would show that this note as well failed to show reasonable grounds for the trial court to hold a hearing on the motion.

Even when a jury note might indicate that the jury was considering some matter that they were not supposed to consider or otherwise were not complying with the instructions in the jury charge, the jury is presumed to have followed a note from the trial court correcting them, at least in the absence of further evidence that the jury persisting in the improper conduct in question. *See Colburn v. State*, 966 S.W.2d 511, 519-20 (Tex Crim. App. 1998) (jury note asking about the possibility of parole was presumably corrected by trial court's instruction not to consider parole in any manner).

In the present case, the jury charge generally instructed them to reach a "unanimous verdict" (CR pp. 108, 111), though it did not specifically apply that to the enhancement special issue. However, the trial court's response to the jury note clarified that "the answer to the special issue must be unanimous," and the jury is presumed to have followed that instruction in the absence of an affidavit or some other indication to the contrary.

Curlee's third issue on appeal should be overruled.

PRAYER

For the foregoing reasons, the State respectfully requests that the judgment of the trial court be affirmed.

Respectfully submitted,

/s/ *Douglas K. Norman*

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RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 3,356.

/s/ *Douglas K. Norman*

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Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was e-served on December 9, 2019, on Appellant's attorney, Mr. Luis Martinez, at Lamvictoriacounty@gmail.com.

/s/ *Douglas K. Norman*

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Douglas K. Norman